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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B5

DATE: **JAN 20 2012** OFFICE: NEBRASKA SERVICE CENTER

FILE:

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a measurement/control instruments business. It seeks to permanently employ the beneficiary in the United States as a business analyst and to classify him as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹ As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

The Director denied the petition on the ground that the petitioner failed to establish its continuing ability to pay the proffered wage to the beneficiary.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the labor certification application (ETA Form 9089) was accepted by the DOL on April 9, 2007. In Box G of the form the petitioner stated that the “offered wage” for the business analyst is \$81,000/year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also*

¹ An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. *See* 8 C.F.R. § 204.5(k)(2). The regulation further states: “A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree”

8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In the decision denying the petition on January 12, 2009, the Director noted that the beneficiary's Form W-2, Wage and Tax Statement, showed that the petitioner paid him \$44,000 (actually \$43,999.92) that year, which was \$37,000 below the proffered wage. The Director also noted that the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2007 recorded negative figures for net income and net current assets that year. The same was true on the petitioner's four previous federal income tax returns for the years 2003-2006. A financial statement for 2007 from the petitioner's controller contained some figures that were inconsistent with the tax returns, the Director added, and likewise failed to establish the petitioner's ability to pay the proffered wage.

On appeal counsel submitted a "balance sheet" and an "income statement" for the petitioner, both dated December 31, 2007, and resubmitted a copy of the beneficiary's W-2 form for 2007. According to counsel, the balance sheet and income statement show that the petitioner had sufficient funds in 2007 to pay the \$37,000 difference between the proffered wage and the amount of compensation the beneficiary actually received in 2007.

In determining the petitioner's ability to pay the proffered wage between the priority date and the present, USCIS first examines whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, the only evidence in the record of the beneficiary's full-year compensation from the petitioner is the W-2 form for 2007 showing that he was paid \$44,000 that year. The record also includes some pay statements from early 2008 indicating that the beneficiary's rate of pay was approximately the same as in 2007. Thus, the petitioner has not established its continuing ability to pay the proffered wage through its actual compensation to the beneficiary from the priority date (April 9, 2007) up to the present.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS will examine the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F.Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it [sic] represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added). Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income.

As shown in the petitioner's federal income tax return for 2007, its net income (Form 1120, line 28), was -\$63,227 that year. Thus, there was no net income out of which the petitioner could have paid the \$37,000 balance of the proffered wage in 2007. No federal income tax returns have been submitted for any year after 2007. Therefore, the petitioner has not established its continuing ability to pay the proffered wage based on its net income over the years.

As another alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets as reflected on its federal income tax return. Net current assets are the difference between the petitioner's current assets and current liabilities.² A

²According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

Schedule L of the petitioner's federal income tax return for 2007 lists current assets of \$626,703 and current liabilities of \$900,940, resulting in net current assets of -\$274,237. Thus, there were no net current assets from which the petitioner could have paid the \$37,000 balance of the proffered wage in 2007. No copies of the petitioner's Form 1120 have been provided for any year since 2007. Thus, the petitioner has not established its continuing ability to pay the proffered wage based on its net income over the years.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612.³ As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner indicated on the Form I-140 that it was established in 2000 and had three employees at the time the petition was filed in December 2007. According to the petitioner's federal income tax returns, the company's gross income during the years 2003-2007 was as follows: \$981,538 (2003), \$950,849 (2004), \$1,040,790 (2005), \$728,700 (2006), and \$1,197,576 (2007). These figures show a roughly 20% increase in annual business from 2003 to 2007, despite a sharp downturn in 2006. At the same time, however, the tax returns do not indicate that the petitioner was able to establish any profitability during those years. The petitioner recorded substantial net losses in each of the years 2003-2007, totaling \$140,798 in 2003, \$202,199 in 2004, \$125,517 in 2005, \$22,824 in 2006, and \$63,227 in 2007. The petitioner's net assets were also deeply in the negative

³ The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

in each of those years. Thus, the record does not show that the petitioner's business has created a steady income stream from which the proffered wages for the job offered – a business analyst – could be paid in full from the priority date up to the present.

As for the "balance sheet" and "income statement" dated December 31, 2007 submitted on appeal, neither of these documents bears any name or other indication of who created it. Moreover, neither document bears any evidence of having been audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying the "balance sheet" and "income statement" submitted on appeal, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the petitioner's ability to pay the proffered wage.

In view of the foregoing factors, the AAO determines that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its ability to pay the proffered wage for the subject position from the priority date up to the present.

Conclusion

For all of the reasons discussed herein, the AAO determines that the petitioner has failed to establish its ability to pay the proffered wage for the business analyst position from the priority date (April 9, 2007) up to the present. Accordingly, the petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.